No. 85-247 (3)

In The

# Supreme Court of the United States

October Term, 1985

Supreme Court, U.S.
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CLERK

LAWRENCE CRANBERG,
*Petitioner,*

vs.

CONSUMERS UNION OF UNITED STATES, INC.,
*Respondent,*

and

LAWRENCE CRANBERG,
*Petitioner,*

vs.

ASSOCIATED PRESS
and
AUSTIN AMERICAN-STATESMAN,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## RESPONDENT CONSUMERS UNION OF UNITED STATES, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly held that the district court did not abuse its discretion in the procedure used to take evidence in the trial of the case before the court.

2. Whether Petitioner waived any complaints about the procedures used by the district court by not objecting to those procedures at the time.

3. Whether the Fifth Circuit erred in holding that the district court's finding that the statements about Petitioner and Petitioner's device published by Consumers Union of United States, Inc. were true was not clearly erroneous.

## PARTIES TO THE PROCEEDING BELOW

Petitioner is Lawrence Cranberg.
Respondent is Consumers Union of United States, Inc.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING BELOW | ii |
| INDEX OF AUTHORITIES | iv |
| STATEMENT OF THE CASE | 2 |
| STATEMENT OF THE FACTS | 2 |
| REASONS FOR DENYING THE WRIT | 2 |
| CONCLUSION | 6 |

## INDEX OF AUTHORITIES

Page

CASES:

Anderson v. City of Bessemer City, N.C., — U.S. —, 105 S.Ct. 1504, 1511-12 (1985) ..... 5

Bose Corporation v. Consumers Union U.S., Inc., 104 S.Ct. 1949 (1984) ..... 5

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 857-58 (1982) ..... 5

Rojas v. Richardson, 703 F.2d 186 (5th Cir. 1983) ..... 4

Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), *modified,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983) ..... 3

Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984) ..... 4

United States v. McCord, 509 F.2d 334 (D.C. Cir. 1974) (en banc), *cert. denied,* 421 U.S. 930 (1975) ..... 3

RULES:

Federal Rules of Civil Procedure: Rule 52(a) ..... 5

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The respondent, CONSUMERS UNION OF UNITED STATES, INC., respectfully requests that this Court deny the petition for certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 756 F.2d 382 (5th Cir. 1985).

## STATEMENT OF THE CASE

This is a diversity case in which Petitioner alleged that his product had been disparaged by an article published in the January 1981 issue of *Consumer Reports* and that he had been defamed by Consumers Union's representative before the American Physical Society. The case was tried before the Honorable Fred Shannon on September 13-14, 1983, along with a companion case Petitioner had filed against Cox Enterprises, Inc. d/b/a Austin American-Statesman, and Associated Press. The court found that the statements published in *Consumer Reports* and Consumers Union's statements at the American Physical Society that Petitioner complained of were true and entered a judgment for Respondent on October 19, 1983. The Fifth Circuit affirmed on April 1, 1985.

## STATEMENT OF FACTS

Judge Clark's opinion for the Fifth Circuit fully sets out the facts.

## REASONS FOR DENYING THE WRIT

1. The Fifth Circuit currently held that the procedures used by the district court to try the case met the requirements of due process and did not constitute an abuse of discretion by the district court.

Petitioner complains that Judge Shannon conducted the trial in an unusual manner. For example, Judge Shan-

non requested Consumers Union to go forward with proof of the truth of their article before Dr. Cranberg put on his case and would not sustain the objections the lawyers for Respondent and the other defendants had at trial to the hearsay evidence Dr. Cranberg introduced.

As long as the requirements of due process were met, the district court had broad discretion as to the level of his questioning of witnesses, the order that witnesses appeared, and the general method of taking evidence. *See Ruiz v. Estelle,* 679 F.2d 1115 (5th Cir. 1982), *modified,* 688 F.2d 266 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983); *United States v. McCord,* 509 F.2d 334 (D.C. Cir. 1974) (en banc), *cert. denied,* 421 U.S. 930 (1975). And the breadth of the discretion is greater when there is a bench trial where one of the parties is pro se. *See Ruiz v. Estelle, supra.*

Here the requirements of due process were more than met. Dr. Cranberg had three months notice of the trial, he called every witness he sought to call, he cross-examined every witness called by the defendants (Tr. 2-250, Tr. 2-262, Tr. 2-224, Tr. 1-180). He was not prevented from asking any question. He took the stand himself twice (Tr. 2-132 to 2-185, Tr. 2-262 to 2-270). And every document he sought to introduce was received into evidence.

The trial was fair, efficient, and, while somewhat unusual, was well within any boundary ever drawn for a federal district court in a bench trial. Any departures from usual trial procedures were for plaintiffs benefit and to respondents' detriment. As the record demonstrates the trial court took great care to ensure plaintiffs his due process.

2. Petitioner waived his objections to the procedures used by the district court.

It is difficult to tell what exactly Petitioner is complaining about other than the fact that the trial lasted only two days. But it is clear that Dr. Cranberg never objected to the procedures used. In fact, he agreed with them. When the court called Consumers Union's engineers as the initial witnesses, Dr. Cranberg agreed (Tr. 1-37). On the first day, Dr. Cranberg asked permission to take his expert witness out of order, which was done (Tr. 1-203). And when the trial court indicated a willingness to make a ruling at the end of the second day, Dr. Cranberg agreed that the trial court should do so (Tr. 2-271). In order to preserve any complaint about the trial proceedings, Dr. Cranberg was obligated to object at the time to afford the trial court an opportunity to decide if his action was appropriate and if not, correct the error. *See Spaulding v. University of Washington,* 740 F.2d 686, 695 (9th Cir. 1984); *Rojas v Richardson,* 703 F.2d 186 (5th Cir. 1983).

3. The Fifth Circuit's conclusion that the district court's findings that the statements were true and were not made with knowledge of falsity or serious doubts about their truth were not clearly erroneous and does not present any question as to the standard of review or other general question of law.

This case presented primarily fact questions for the trial court to resolve. With respect to Consumers Union, the key fact questions and credibility determinations were whether Consumers Union's tests were run and its findings accurately reported; whether Consumers Union acted with "actual malice"—i.e., that it knew that its tests were false or had serious doubts about their truth; and whether Consumers Union's presentation to the American Physical

Society concerning Dr. Cranberg was false and was made with knowledge of falsity or with serious doubts about the truth of statements therein. The trial court had ample evidence, both live and documentary, with which to conclude that Consumers Union accurately ran its tests and reported its findings without any knowledge as to any falsity, if any, therein and further that Consumers Union's description of Dr. Cranberg's actions in its presentation to the American Physical Society was substantially true and made without knowledge of its falsity or serious doubts about its truth.

It was the Fifth Circuit's responsibility to review the trial court's findings that the *Consumer Reports* article and Consumers Union's presentation before the American Physical Society were true and were not published or made with knowledge of falsity or serious doubts about their truth; it could not reverse that finding unless it concluded that it was clearly erroneous. Fed. R. Civ P. 52(a); *Anderson v. City of Bessemer City, N.C.*, — U.S. —, 105 S.Ct. 1504, 1511-12 (1985); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857-58 (1982). The trial court's findings were based in large part upon credibility determinations and, accordingly, they must be given special deference upon appeal; *Bose Corporation v. Consumers Union U.S., Inc.*, 104 S.Ct. 1949 (1984). The Fifth Circuit properly applied the usual "clearly erroneous" standard and correctly upheld the fact finder's finding. Its holding presents no question as to the standard of review or other general question of law.

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## CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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